Supreme Court of the United States

October Term, 1919.

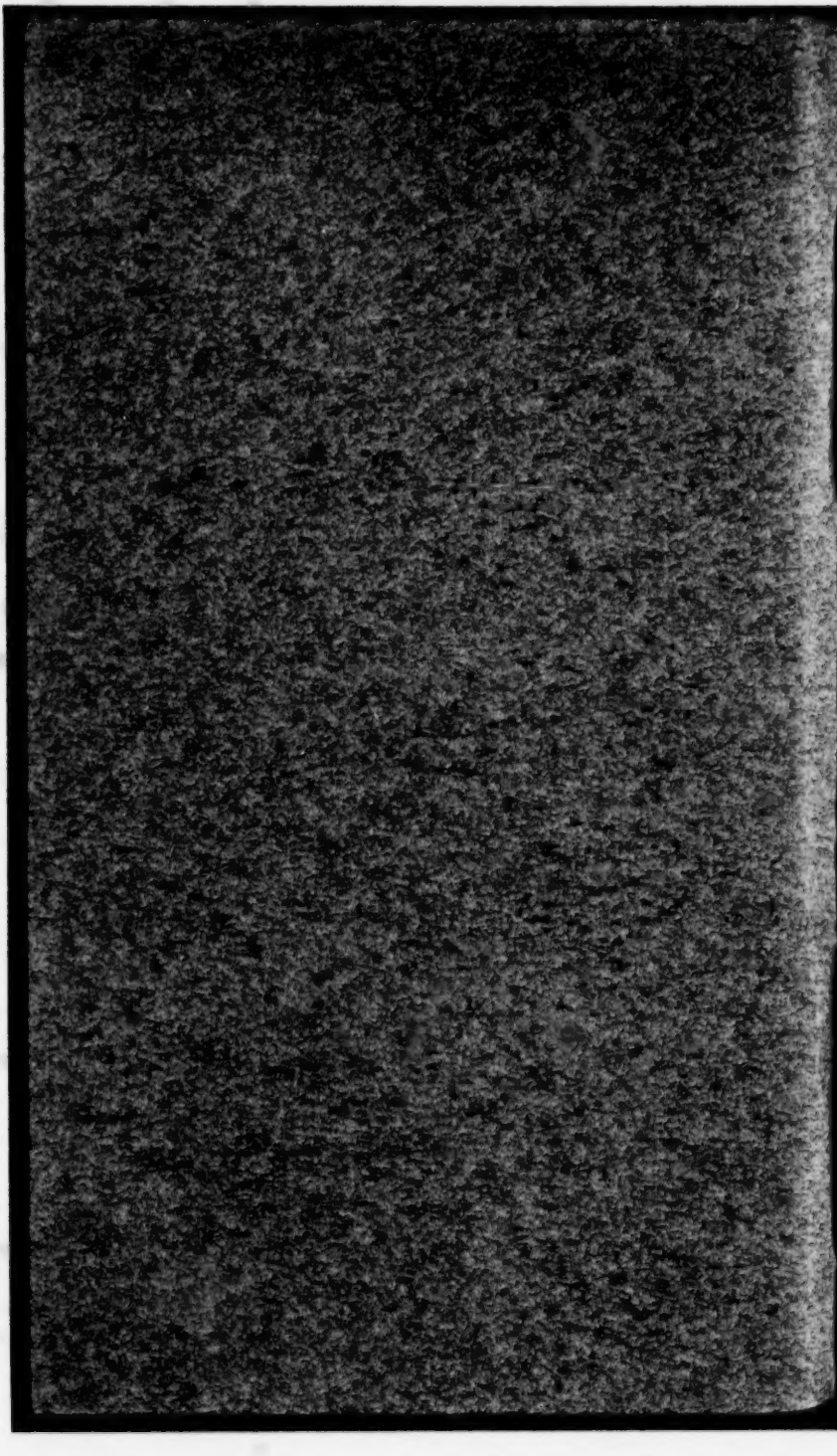
THE CHESAPEAKE AND OHIO RAILWAY
v.
THE UNITED STATES.

No. 61

BRIEF FOR APPELLANT.

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Such transfer of claims was by operation of law, the right of merger and the procedure therein being prescribed by statute 9

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Supreme Court of the United States.

October Term, 1919.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 248.

BRIEF FOR APPELLANT.

The suit here brought before this court is almost the last chapter in a somewhat tedious series of proceedings at the Court of Claims, all upon the same ground, brought by seventeen railroad companies. The matter complained of was that frequently during the war with Spain, and sometimes thereafter, confusion occurred, in the shipping and in accounting with the carrier, between personal baggage, which was the personal property of officers or enlisted men of the army, and freights (being supplies or equipment for troops) which were public property. By custom, and, in some cases, by express agreement between quartermaster officers and the carriers, every passenger was entitled to free transportation of his personal baggage to the amount of 150 pounds. There had been controversies before regarding this customary free allowance, and the Comptroller of the Treasury, holding that it included only personal belongings of the officers and soldiers, admonished the Quartermasters (1) that articles of this character must be carried in cars assigned separately to that use or (2) that if they were carried in cars with public property the

weights should be taken separately. These directions were not always observed. Although the carriers for troop movements furnished cars of the kinds called for by the Quartermasters, the latter oftentimes loaded indiscriminately, into baggage cars and freight cars alike, both baggage and freight, and neither upon the bills of lading, which were prepared by them, nor in other way did they make any record of the separate weights; then, when they came to pay the carriers, they counted that freight and baggage, to a total of 150 times the number of passengers in the organization to which the goods appertained, was exempt from the carriage charges.

On this appeal a single question is to be decided, viz: whether appellant (claimant in the Court of Claims) is the effectual owner of claims which formerly belonged to another corporation, the Florida Central & Peninsular Railroad Company. Services were performed by the latter company for the Government in the years 1897 to 1903. In the summer of 1903, by proceedings had in conformance with the laws of the States of Georgia and Florida, where both corporations had been chartered, that company was merged into appellant.

Some twelve years had been spent in preparing this case for trial—mainly to supply the loss of records stored in a Florida Central & Peninsular depot which was destroyed by fire and to overcome obstructions interposed at the Treasury Department—and preparing briefs on the merits of the case. Then, at the hearing, Government counsel raised the question that this merger amounted to a voluntary assignment of the Florida Central & Peninsular assets and so, by reason of Section 3477 of the Revised Statutes, was inoperative to pass title to claims against the United States. The court made findings of fact adverse to claimant both on this question and on the merits of the case and dis-

missed the petition. In an opinion filed it was shown that the case was regarded as not proved on certain material points because the court gave no consideration to a stipulation of counsel which had been treated in the briefs on both sides as part of the case. At the hearing Assistant Attorney-General Huston Thompson had taken charge of the defense. He said that he didn't regard himself as personally bound by the stipulation here referred to nor by the decisions of the court in the cases previously brought to judgment, fifteen in number; that he had no knowledge of his own regarding the facts stated in the stipulation (which was signed by one of his predecessors) and had not examined the testimony on which it was supposed to be based; and that the prior decisions, all except one, had been rendered before he succeeded to the office and he did not know whether the issues decided were precisely those which this case presented. No motion was made, however, to strike the stipulation and the court took no account of the Assistant Attorney-General's observation until it came to decide the case.

Claimant, moving for a new trial, pointed out the injury it had suffered by the cancellation, after submission, of this stipulation and other proofs, filed affidavit proof and discussed the propositions of law presented in the opinion. The court then delivered a new opinion reasserting, as a sole ground for dismissing the petition, the "voluntary assignment" to claimant but leaving the findings of fact, conclusion of law and judgment to stand as they were. Having treated of this question of parties *in extenso*, the opinion, at its conclusion, conceded that if the case was to be decided on its merits it would be proper to give claimant an opportunity for making additional proof; "but," it said, "we are met by the fact that in our opinion plaintiff can not maintain

the action because of Section 3477 above discussed." Then Section 165 of the Judicial Code was quoted and this was added:

> "Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result."

Before taking its appeal claimant filed a motion asking that the parts of the findings which related to the merits of the case be eliminated. This motion was overruled by the court. Incorporated in the application for appeal was a motion for omission from the transcript of the findings relating to the merits. This also was denied; so except for the opinion the case comes to this court on precisely the same record that would have been sent up if there had been a decision unfavorable to claimant both on the question of its standing in court and on the merits of the claim.

The other proofs against which the court closed the door in the same startling way—*i. e.*, by action of its own, unmoved in any way by defendant's counsel, taken after the submission—had been drawn formally, in the way prescribed by the rules and practices of the court, from the files of those suits of other railroad companies, on the same subject, which the court had decided during some seven years preceding.

In all of those fifteen antecedent cases the judgments had been for the claimants; and much of the evidence on which those judgments were rendered was of the same pertinence to the present cases as to the cases of which it was entitled. Moreover, in divers of those cases the particular defenses which offered in the present case (including even the question of a corporation's

acquisition of a claim by the process of a merger) had been urged and been overruled by the court. Counsel for claimant believed, and now believe that *stare decisis* would have a sufficient rejoinder, if no other had existed, both to the general traverse and to these special defenses.

Upon filing here the appeal record claimant moved for excision therefrom of the particular findings of the Court of Claims which go to the merits of the case. With that motion there were printed as exhibits six certified extracts from Court of Claims records beside a brief. The facts stated above, where not included in the record proper (which, not having been printed at that time, is referred to in the motion as "typewritten record") will be found in those transcripts. That motion, by order of the court, stands for hearing with the appeal proper.

ASSIGNMENT OF ERROR.

Error is assigned, committed by the Court of Claims, as below:

(1) In entertaining, after general traverse filed, proof made and trial commenced, an objection to claimant's capacity to maintain the suit.

(2) In holding that the merger of the Florida Central & Peninsular Railroad Company into the claimant corporation was a voluntary assignment of the former's choses in action.

(3) In not holding that the claimant corporation is the owner of all the choses in action formerly held by the Florida Central & Peninsular Railroad Company and competent to prosecute any claims against the United States that had accrued to that company.

(4) In not holding that the question of the claimant corporation's right to maintain suit on the claims pleaded was affirmatively settled by the previous de-

cisions of the Court of Claims itself relative to mergers such as was shown in this case.

(5) In not holding that the whole question of claimant's right to have a judgment against the United States as prayed was affirmatively settled by previous decisions of the Court of Claims itself in like cases.

(6) In holding that full proof of the right of action set up in the petition would be futile, by reason of Section 165 of the Judicial Code, and denying, therefore, to claimant the right to make such proof.

(7) In holding that Section 165 of the Judicial Code forbade the making of proof by claimant to supply omissions caused by the court's cancellation *ex mero motu* of proofs on which the case was submitted and to remedy assumptions, indulged by the court, to claimant's injury, notwithstanding that the burden was on the defendant to establish the matters so assumed.

PROPOSITIONS OF LAW.

Section 3477 of the Revised Statutes is merely for the protection of the Government. It seeks to prevent the acquiring by strangers of speculative interests in claims, such as may naturally inspire efforts for their collection, and the imperilling of the Government's rights through the need of dealing with several persons instead of one.

Spofford v. *Kirk*, 97 U. S. 484.
Goodman v. *Niblack*, 102 U. S. 556.
Bailey v. *United States*, 109 U. S. 432.
Price v. *Forrest*, 173 U. S. 410.

Section 3477 does not apply to any transaction or fortuity by which the existence, natural or legal, of one person or legal entity is terminated and another suc-

ceeds to its rights, nor to any transfer of a claim by operation of law. Inheritance of a decedent's estate, an assignment for the benefit of creditors, or other insolvency proceedings, bankruptcy, whether involuntary or voluntary, a receivership or a bequest in a will is as effectual to transfer a claim against the United States as any other claim.

Erwin v. *United States*, 97 U. S. 392.
Butler v. *Goreley*, 146 U. S. 303.
Goodman v. *Niblack*, *sup.*
Price v. *Forrest*, *sup.*

A question regarding the form of a suit or the parties thereto is subject to the general rules governing pleas in abatement. It must be raised before an issue is framed as to the merits of the suit; otherwise it is waived.

Lanier v. *Trigg*, 6 Sm. & M. (Miss.) 641.
Commercial Bank v. *Thompson*, 7 Sm. & M. 443.
Mills, et al, v. *Extrs. of Bland*, 76 Ill. 381.
Bailey v. *Dozier*, 6 How. 23 (30).
Holdridge v. *Holdridge's Estate*, 53 Vt. 546.
Watts, Trustee, v. *Sweeney*, 127 Ind. 116.
Chamberlayne v. *Nazro*, 188 Mass. 454.
Baker v. *Union Stock Yards Nat. Bank*, 63 Nebr. 801.
Union Type Foundry Co. v. *Kittaning Ins. Co.* 138 Pa. St. 137.
Morgan v. *First Natl. Bank*, 93 N. C. 352.

Statutes abolishing special pleading or authorizing "brief statement" of the issues do not change the order of pleading fixed by the common law so as to permit

pleading in abatement after or in conjunction with pleas in bar of the action.

Clark v. *Oregon Short Line R. R. Co.* 29 Mont. 319.

Kenyon v. *Williams*, 19 Ind. 44 (47).

Stewart v. *Smith*, 98 Me. 104.

Though a statute and a rule of a federal court require that, if it appears to the satisfaction of the court at any time that the controversy is not within its jurisdiction, the suit shall not be permitted to proceed further, they do not give either party a right, without proper pleading, at the proper time, to offer proof and make out a case calling for such dismissal.

Hartog v. *Memory*, 116 U. S. 588.

If the rule of the court permits simultaneous pleading of matter in abatement and matter in bar, a plea to the merits alone is nevertheless a waiver of matter in abatement.

Hewitt v. *Story*, 39 Fed. 158 (160).

ARGUMENT.

Nothing will be said here except upon the question which the Court of Claims, in its opinion, says it has decided, viz: the capacity of appellant to maintain the action. In regard to the other matter which appellant has felt itself compelled to bring up for correction by this court, viz: the irrelevancy and impropriety of findings of fact going to the merits of the suit, reliance will be on the brief which accompanied the motion made in that behalf.

Section 3477 of the Revised Statutes, even though seasonably invoked, could have no pertinence to the suit.

In *Erwin* v. *United States*, 97 U. S. 392, and later cases this court has decided that when, in the very act

or event by which choses in action are transmitted the original holder is extinguished as a legal entity, Section 3477 of the Revised Statutes does not apply. That is the present case precisely. The Florida Central & Peninsular Railroad company from the moment of the merger into the Seaboard company ceased to exist. Its stock was cancelled by a substitution of Seaboard shares. No pretense of an organization was maintained thereafter. The company disappeared from the railway manuals except for the inclusion of its bonds, under the Seaboard caption, among the Seaboard liabilities. There was no power left except the Seaboard company to prosecute any claim against any debtor.

It is submitted that, to say a claim perishes when its owner dies or surrenders to others his entire estate and his place in the business world, would be to misread radically *Erwin's* case, *sup*, *Butler* v. *Goreley*, 146 U. S. 303, and *Goodman* v. *Niblack*, 102 U. S. 556.

If no thought be taken of the status or rather the non-existence of the Florida Central & Peninsular company, after its merger, it still will be obvious that this merger, like the inheritance by children of their father's choses in action, like bankruptcy or insolvency proceedings, like a receivership, is an "operation of law." Not one step could be taken effectually to put the Seaboard company in the shoes of the other company unless it were the step prescribed, and the method pursued were the method prescribed, by the State laws to which the two corporations owed their existence. Surely a corporation merger is the work of the law in a stricter sense than is an inheritance from an intestate ancestor or a bequest in a will.

Having pleaded to the merits of the case and then, during some thirteen years having participated in the preparation of the case, and finally having gone to trial on that issue, the defendant had forfeited all right to make objection to the party plaintiff.

The decisions of this court and of all others in this country, except where a local statute has created an exception, are very clear to the point that, if a defendant wishes to avail of something not going to the merits of the claim sued on, he must do so before pleading to the merits, or at least before going to trial upon the merits. Various illustrations of this rule are afforded by the cases cited above (pp. 7 and 8), and it hardly seems necessary to amplify the proposition stated. The application of a few among those cases, however, may well be explained.

In *Lanier* v. *Trigg*, 6 Sm. & M. (Miss.) 641, the suit was upon a promissory note, and the plaintiff was, and described himself as being, assignee of the payee. Having joined issue on the merits of the suit, the defendant sought at the trial to plead and prove that the assignment was of a kind invalidated by law. It was held that such a plea did not lie after the controversy had been framed on the merits of the suit. To the same effect is *Commercial Bank* v. *Thompson*, 7 Sm. & M. (Miss.) 443.

A somewhat remarkable case is *Mills, et al.* v. *Executors of Bland*, 76 Ill. 381. The suit there had been brought in the name of Mrs. Bland. The attorneys who had instituted the proceeding suggested later the death of Mrs. Bland, had her executors substituted as plaintiffs and filed an amended declaration. To that the defendants pleaded in bar. At the trial the defend-

ants sought and were denied leave to show that Mrs. Bland in fact had died before the suit was commenced. The appellate court concurred in the view that every issue, except relating to the merits of the claim, was closed when the trial opened, and affirmed the judgment.

In the instant case the original petition was filed in April, 1904. No demurrer or special plea being interposed, an issue was made up, upon the merits of the case alone, sixty days thereafter (Opinion, record, p. 23). The Government joined in the various and vexing labors required to prepare the case for trial, and then went to trial in February, 1917, on the merits. At this stage—twelve years after the time when a suit by any other claimant than the Seaboard Air Line Railway would have been barred—Government counsel interposed the objection that the right of action was not in this company. If there were a discretion in the Court of Claims to entertain a dilatory plea after issue joined on the merits (which we say there was not) it would have been an abuse of discretion to entertain it after the doors of the court were closed to the other party whom the defendant was bound to point out (by way of tendering a better writ) as the proper claimant.

The Court of Claims, while not denying that there is a fixed order for the pleadings which it will receive, cites *Labadie's* case, 31 Ct. Cls. 436, as authority for allowing special pleading, at the court's discretion, after the lapse of the sixty days fixed for demurrer, plea or answer. In that case, however, the belated plea, so-called, which the court received was truly a counter-claim; it related strictly to the merits of the plaintiff's claim, because it undertook to apply, against a judgment to be rendered thereon, a claim of the Government against the plaintiff. The decision, therefore, is not a warrant for entertaining

a plea in abatement after or upon trial of the merits of the plaintiff's claim.

If Labadie had not been the true party in interest but merely posed as such, and the Government nevertheless had filed a plea of the general issue, and no more, and, after proof made to establish the right of action pleaded, had for the first time attempted to plead the absence of the proper party plaintiff, it is not to be imagined that the Court of Claims would have indulged it so to do.

In *Butler* v. *Goreley*, 143 U. S. 301, the assignment made by the owner of the claim was clearly of the sort to which Section 3477 applied, but the owner, so far from repudiating it, had stood by while the assignee made collection at the Treasury. The owner, bringing suit against the assignee for the money, was held to be concluded by his acts. If negative and informal action—mere sufferance by an outsider of a suit—is conclusive, can the defendant in the suit itself avoid an assignment after he has joined in a trial upon the merits of the claim?

To comply with Section 159 of the Judicial Code, to which the opinion of the Court of Claims refers as contributing to frame issues, the petition averred that "no part of the claim sued on had been paid" and that "its claim" (petitioner's) thereto had not been assigned. Here, according to the usual practice of the Court of Claims, Section 159 was applied as requiring merely a negation of any alienation by the petitioner itself of the claim stated—as having no relation whatever to the method by which the petitioner had acquired the claim. This, however, does not seem to be material. It is often necessary to plead, in connection with a statement of the injury done, or debt due by the defendant, matters going to the jurisdiction of the court over the parties or to the personal capacity of the plaintiff to prosecute

the claim; but issues on such points are matters of abatement, and must be raised in advance of a contest upon the cause of action itself. In the three cases last discussed above and in others of those cited at pp. 7 and 8, *sup.*, the juridisdictional facts, or the facts which connected the plaintiffs with the causes of action, were pleaded in the petitions, but it did not follow that the defendants might forbear raising issues touching those facts until after issue had been made upon their pleas in bar of the actions.

The Court of Claims in its opinion says that "the plaintiff relies upon the familiar rule that at common law a plea in bar is a waiver of matter which should be pleaded in abatement." Appellant's counsel did contend for that rule both at the hearing and in their motion to set the judgment aside, and they contend for it here as being not less applicable, in law and in morals, to the United States and to the Court of Claims than to other litigants and other courts.

The opinion of the Court of Claims also (p. 24) invokes Section 165 of the Judicial Code, as follows:

> "When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein."

The similarity of this provision to the act of 1875 construed in *Hartog* v. *Memory*, 116 U.S. 588, applying to other federal courts will be obvious. Undoubtedly it was intended to serve the same office in the Court of Claims which that enactment performs in the other courts; and this means that, while the court will not consciously waste its time upon matters which it can not effectually decide, it must not permit the defendant, out of season, to raise objection to the entertainment of a claim which, if proved, entitles the claimant to a judgment.

What the present claimant pleaded (Rec. p. 1) was that it "owns and operates other railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded" and that "one of said corporations was the Florida Central & Peninsular Railroad Company." The Government's objection, assigned at the hearing (Rec. p. 18) was that the merger referred to, in the case of the Florida Central & Peninsular company, was of such sort as to be obnoxious to Section 3477 of the Revised Statutes, and in relation to this proof was then made for the first time. It is respectfully submitted that the right to make any such defense was waived by pleading the general issue, upon the merits of the claim, or by proceeding during long years to make proof upon the merits alone, or at least by entering upon the trial without any pleading or any proof except upon the merits.

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